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J MARK HOLLAND & ASSOCIATES
3 CIVIC PLAZA SUITE 210
NEWPORT BEACH CA 92660

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MAR 14 2006

In re Application of :
Dan W.C. Delmer :
Application No. 09/904,975 :
Filed: July 12, 2001 :
Attorney Docket No. DELME-P2739 :

**OFFICE OF PETITIONS
ON PETITION**

This is a decision on the petition, filed January 20, 2006 under 37 CFR 1.137(b), to revive the above-identified application.

The petition is **DISMISSED**.

Any further petition to revive the above-identified application must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 CFR 1.136(b) are permitted. The reconsideration request should include a cover letter entitled "Petition under 37 CFR 1.137." This is **not** final agency action within the meaning of 5 U.S.C. § 704.

This application became abandoned for failure to timely reply to the final Office Action mailed November 14, 2003. An amendment, filed January 21, 2004 and re-submitted June 14, 2004 was considered and the applicant was advised in an advisory action mailed October 18, 2005 that the amendment did not place the application in condition for allowance. No timely response having been filed thereafter, this application became abandoned. Accordingly, a Notice of Abandonment was mailed December 6, 2005.

A grantable petition to revive an abandoned application under 37 CFR 1.137(b) must be accompanied by:

(1) the required reply (unless previously filed), which may be met by the filing of a continuing application in a nonprovisional application abandoned for failure to prosecute, but must be the payment of the issue fee or any outstanding balance thereof in an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof;

(2) the petition fee required by 37 CFR 1.17(l);

(3) a statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(b) was unintentional. The Commissioner may require additional information where there is a question whether the delay was unintentional; and

(4) a terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) in a design application, a utility application filed before June 8, 1995, or a plant application filed

before June 8, 1995.

The petition does not satisfy requirement (1) above.

The application became abandoned for failure to file a response within the meaning of 37 CFR 1.113 to the final rejection of November 14, 2003, within the time period for response. The only proper reply to a final Office action is an amendment placing the application in *prima facie* condition for allowance, a Notice of Appeal accompanied by the requisite fee, a Request for Continued Examination (RCE) accompanied by a proper submission, or a continuing application. Since the amendment submitted with the petition has been referred to the examiner, who has indicated that the amendment still does not *prima facie* place the application in condition for allowance, the response required for a renewed petition must be a Notice of Appeal and requisite fee, or the filing of a continuing application under the terms set forth in 1031 O.G. 11.¹

Petitioners are correct in their assertion that since the proper fees were not submitted with the petition filed January 21, 2004 (re-submitted June 14, 2004), the petition could not be treated under 37 CFR 1.137(b) and thus, the fees submitted at that time, \$55, have been applied with the fees submitted with the instant petition, \$695 to make up the appropriate petition fees due pursuant to 37 CFR 1.17m, \$750.

Petitioner must submit a proper reply to the final Office action mailed on November 14, 2003, with any renewed petition. **Petitioner should note that submission of any renewed petition without the required reply will be construed as intentional delay.**

Further correspondence with respect to this matter should be addressed as follows:

By mail: Mail Stop Petitions
Commissioner for Patents
P.O. Box 1450
Alexandria VA 22313-1450

By FAX: (571) 273-8300
ATTN: Office of Petitions

Telephone inquiries concerning this matter may be directed to the undersigned Petitions Attorney at (571) 272-3212.



Patricia Faison-Ball
Senior Petitions Attorney
Office of Petitions

¹Per the Examiner, amended claims 8 and 10 have included an extended preamble drawn to an apparatus, but the apparatus is not part of the claimed invention of a stretching tool (claim 8) or a temporary stretch-holding device (claim 10), which are claimed in the body of their respective claims